Supreme Court, U.S.
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No. 96-2002

In The

Supreme Court of the United States

October Term, 1996

AMERITECH CORPORATION, AMERITECH SERVICES, INC. and MICHIGAN BELL TELEPHONE CO.,

Petitioners,

vs.

GARY RACZAK, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the common law doctrines of ratification and tender back can be utilized to enforce a waiver of ADEA rights which is not in compliance with the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f).

LIST OF PARTIES

The Petitioners are Ameritech Corporation, Ameritech Services, Inc. and Michigan Bell Telephone Company. Ameritech Corporation is the parent of Ameritech Services, Inc. and Michigan Bell Telephone Company.

The Respondents are Gary Raczak, Carol Chandler, Bernard Surma, Thomas Satkiewicz, Loraine Holmes, Gladys Moore, Jean Kruse, Phyllis Tarpley, and Lou Ann Fox. Other plaintiffs in the District Court proceedings are Dorothy Payne, George Kinsela, Louise Ward Neal, Rex Staskal and Cathleen Longan.

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OPINIONS BELOW

The unreported Opinion of the District Court from which appeal to the Sixth Circuit Court of Appeals was taken may be found at 1994 WL 780899 (E.D. Mich. August 1, 1994). The Sixth Circuit Court of Appeals Opinion is reported at 103 F.3d 1257.

STATEMENT OF JURISDICTION

The Sixth Circuit Court of Appeals made its ruling and judgment on January 9, 1997. A petition for rehearing and suggestion for rehearing en banc was denied on March 21, 1997. The Petitioner then filed a Petition for Writ of Certiorari 90 days thereafter. The jurisdiction of this Court is based upon 28 U.S.C. § 1251(1).

STATUTORY PROVISION INVOLVED

Title II of the Older Workers Benefit Protection Act (OWBPA), an amendment to the Age Discrimination And Employment Act, 29 U.S.C. § 626(f).

STATEMENT OF THE CASE

The petition of *Ameritech Corporation, et al.* arises from the Sixth Circuit's decision to not allow the Respondents' failure to tender back severance pay received in exchange for a waiver not in compliance with the Older Workers Benefit Protection Act to constitute a ratification of the noncomplying waiver. The Respondents were terminated by Ameritech Services, Inc., and Michigan Bell Telephone Company in November of 1992 as part a massive company wide reduction in the workforce which resulted in thousands of employees losing their jobs. The Respondents' filed charges of age discrimination with the Equal

Employment Opportunity Commission and alleged that the information provided was insufficient and did not comply with the provisions of the Older Workers Benefit Protection Act (ADEA), 29 U.S.C. § 626(f). Counsel for Respondents also sent a letter to Ameritech Corporation, Michigan Bell Corporation and Ameritech Service, Inc., requesting that additional information be provided to comply with the OWBPA. The Petitioner denied this request, no additional information was provided.

On June 28, 1993, the Respondents' filed a Complaint in United States District Court alleging that their termination violated the Age Discrimination and Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* Before any discovery was done the defendants filed counterclaims against the Respondents and a Motion for Summary Judgment claiming Plaintiffs' claims should be barred because they signed termination agreements which contained a waiver of all their claims.

The Respondents requested limited discovery on the waiver issue, at a scheduling conference with the District Court, however, Petitioner's strenuously objected claiming discovery was unnecessary and the only records needed for consideration of the Summary Judgment Motion were the severance documents provided to the plaintiffs when terminated.

Thereafter, Respondent's filed a Motion for Partial Summary Judgment claiming the Petitioner's had not complied with the Older Workers Benefit Protection Act, thereby invalidating the waivers. On August 1, 1994 the District Court issued its Opinion denying the Petitioner's Motion for Summary Judgment and granting Respondents' Motion for Partial Summary Judgment. Judge Cohn found that since the OWBPA specifically stated that the job titles of employees must be provided the Petitioner was not in compliance by merely

providing salary grades. With respect to the common law doctrines of ratification and tender back, Judge Cohn found that, "It would be inequitable and contrary to the protective nature of the OWBPA to require plaintiffs to tender back the consideration received in exchange for executing waivers where the waivers were obtained without compliance with the OWBPA. (Cohn Op. at p. 21).

The Petitioners' then filed a Motion for an Evidentiary Hearing and a Motion for Certification of The Court's August 1, 1994, Order for Interlocutory Appeal and to stay proceedings pending appeal. On November 22, 1994, the District Court denied Petitioner's motion for an evidentiary hearing and to stay proceedings, but did certify the August 1, 1994 Order as final. The Sixth Circuit granted the Petitioners' request for interlocutory appeal January 31, 1995.

On January 9, 1997 the Sixth Circuit Court of Appeals issued its Opinion *Raczak v. Ameritech,* 103 F.3d 1257 (6th Cir. 1997) holding:

1. There should be further proceedings to determine whether the information provided was understandable, "to a worker trying to access whether age discrimination actually occurred and trying to access what the prospects of a suit would be whether or not discrimination actually occurred", 103 F.3d at p. 1264 reversing the lower court ruling that failure to provide job title by itself made the waivers unenforceable;

2. All three judges held there had been no ratification of the waivers by the appellees failure to tender back the severance pay received in exchange for signing them.

3. Judges Jones and Guy ruled that the money retained by the employees would be deducted from any award to the employees, while Judge Boggs 103 F.3d at p. 1268 indicated

that the compensation received should be tendered back in order for the Appellees to continue the lawsuit.

STATEMENT OF THE FACTS

The reduction in force plan used by both Michigan Bell and Ameritech Services, Inc. (ASI) was called CRESP, the Company Resizing Program. Both companies based their procedure on annual bonus payments called merit awards at Ameritech Services, Inc. and ICA awards at Michigan Bell. The employees who received the lowest awards during the preceding two years were placed in an at risk pool for termination. At ASI the risk pool was made up of the bottom 30% of ranked employees, and at Michigan Bell the bottom 20% of ranked employees. Both ASI and Bell also had a process of excluding employees from consideration for termination which included recent promotion, and recent hire, along with other criteria. The employees in the 20% and 30% risk groups were then sent on to a second stage for further review, and were broken up into smaller groups consisting of employees with similar skills, experience and knowledge. The employees were ranked a second time based upon job skills, performance, growth potential and "breakthrough leadership criteria". After rankings were done in the subgroupings, lines were drawn to determine who would be terminated pursuant to the resizing process.

Employees could voluntarily except Ameritech's separation package prior to the date in November on which terminations would be announced. Many employees accepted separation packages upon learning that they were in the at risk pool of either 20% or 30% and therefore in jeopardy of being terminated.

In the Petition for Writ of Certiorari it is contended that Raczak volunteered for early retirement. However, Mr. Raczak was informed by his manager that he was selected for

termination and under those circumstances he "volunteered" for retirement. Subsequently, Raczak revoked the waiver which Petitioner refuses to accept.

As part of the separation package the Petitioners' were required under the OWBPA to provide the ages and job titles of employees selected and not selected for termination by Michigan Bell and ASI. ASI included employees who had been selected for termination by the CRESP procedure in the "not selected" column, if they had agreed to the severance package prior to the November termination date. Similarly, Michigan Bell included in its "retained" category employees who had been selected for termination but accepted the severance package prior to the November termination date. Neither ASI nor Michigan Bell informed terminated employees that the "not selected" category included employees who had been selected for termination, or that the "retained" category included employees who had been selected for termination. Therefore, the employees did not know at the time waivers were presented to them or, for more than a year thereafter, the true definition of the categories, "not selected" and "retained". It was only through discovery conducted later in cases brought on behalf of employees who did not sign the waiver that this information was discovered. Furthermore, the difference is statistically significant for both ASI and Michigan Bell. The discovery in other cases shows a strong pattern of age discrimination which ASI and Michigan Bell attempted to cover up by mischaracterizing information provided to terminated employees.

ARGUMENT

I.

"AN INDIVIDUAL MAY NOT WAIVE" ADEA RIGHTS UNLESS THE REQUIREMENTS OF THE OWBPA ARE MET.

Three of the five Appellate Courts deciding the tender back-ratification issue have held there can be no ratification of a waiver not in compliance with the OWBPA and tender back is not required. The Seventh Circuit in *Oberg v. Allied Van Lines, Inc.*, 11 F.3d 679 (7th Cir. 1993), *cert. denied*, 114 S. Ct. 2104 (1994), and the Third Circuit in *Long v. Sears Roebuck & Co.*, 105 Fed. 1529 (3d Cir. 1997) petition for certiorari filed June 9, 1997 (docket No. pending), have taken the same position as the Sixth Circuit in this case. The Fifth Circuit opinion of *Wamsley v. Champion Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993), *cert. denied*, 115 S. Ct. 1403 (1995) and the Fourth Circuit opinion of *Blistein v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996) hold that illegal waivers can be ratified and that tender back is required prior to filing suit.

The essence of the Petitioners' argument is that an individual *may* waive ADEA rights even though the waiver does *not* comply with the Older Workers Benefit Protection Act. *Wamsley v. Champlin Refining and Chemicals, Inc.*, 11 F.3d 534 (5th Cir. 1993) The Petitioner, Ameritech Corporation, *et al.* must take the position as the Court did in *Wamsley v. Champlin Refining and Chemicals, Inc.*, *supra*, that although the waivers presented to them were not in compliance with the OWBPA, the retention of severance pay given in consideration for the waivers constituted a "new promise" to waive their ADEA rights which was not subject to the waiver requirements of the OWBPA. The only way this result is obtained is by grafting onto the OWBPA

the common law doctrine of ratification and tender back even though no mention is made of them in the statute, nor is there any indication that a waiver can be effectuated except by meeting the requirements of the statute.

Although the Petitioner concedes that the OWBPA preempted the common law as to the adequacy of releases (p. 9 of Petition for Writ of Certiorari) it still asserts that the common law of ratification and tender back has not been preempted allowing releases which do not comply with the OWBPA to be enforceable.

In explaining its holding, the Court in *Wamsley* put the position the Petitioner must take in this case most succinctly in Footnote 11 found on page 540 of its Opinion where it discusses the "new promise" to waive ADEA rights:

> As a new promise that created a new obligation, it is *not subject* to the *waiver requirements of Section 626*, and thus, such requirements pose no bar to its enforcement.

(Emphasis added).

This is the core of Petitioner's argument. This is the foundation of *Wamsley, supra,* and *Blistein v. St. John's College*, 74 F.3d 1459 (4th Cir. 1996) .

On the contrary, the Older Worker's Benefit Protection Act says this: "An individual may not waive" claims under the ADEA unless the eight requirements specified are met. The statute does not indicate that it is a mere guideline which may or may not be followed at the whim of the employer, it does not indicate that a waiver may be valid if *some* of its requirements are met. It does not indicate that a second, third, or fourth waiver may be valid

if it does not meet the requirements of the statute. It does not indicate that a new nonconforming agreement may be valid even though the old one is invalid. It does not say that an individual may waive ADEA rights if he really wants to, intends to, and never tries to enforce them, if the requirements of the statute are not met. To the contrary, the statute says an individual may not waive ADEA rights unless the statutory requirements are met. The statute provides for no exceptions.

As stated in the recently decided Sixth Circuit case of *Howlett et al. v. Holiday Inns*, Case No. 95-6236 (6th Cir., August 5, 1997):

> Thus, it is clear from the statute that a former employee could no more assent to the waiver of his or her ADEA claims *after* having signed the defective release than he or she could *at the time* of signing it. Although Congress utilized the familiar language of the common law when it deemed that no waiver would be "knowing and voluntary" unless the eight OWBPA requirements were met, it did not stop there; it also provided that an individual *may not waive* an ADEA claim unless the waiver is knowing and voluntary. 29 U.S.C. § 626(f)(1). *Allowing an employee to ratify a release which violates the OWBPA would directly contradict this language.*

(Emphasis added) (App. A at p. 6a). If the requirements of the OWBPA are not met, there can be no waiver of ADEA rights. A nonconforming "waiver" does not exist and cannot exist. The individual's rights under the ADEA still exist and are still enforceable whether the individual wishes to exercise them or not.

The Petitioner in this case is asking this Court to rule that an individual has waived ADEA rights even though the "waiver" does not conform to the requirements of the OWBPA. The Court in *Wamsley* indicated that void contracts cannot be ratified because they are not contracts; without any antecedent contract to ratify, there can be no ratification. 11 F.3d p. 539. However, applying common law contract principals, the Court in *Wamsley* decided that nonconforming waivers were not void of legal effect:

> Rather, we interpret it to mean that such waivers are not knowing and voluntary and thus are subject to being avoided at the *election of the employee.*

(Emphasis added) 11 F.3d p. 539. The problem with this interpretation is that the OWBPA does not allow an employee to waive rights without its requirements being met. The individual does not decide whether his or her rights have been waived. Rather, the Older Workers Benefit Protection Act does. Again, that Act says, "An individual may not waive" ADEA rights unless its requirements are met. It does not allow an individual to waive ADEA rights of his or her own volition. An individual may choose to not exercise ADEA rights, however, this does not mean those rights have been waived.

Indeed, the entire purpose of the Older Workers Benefit Protection Act would be subverted if this Court adopts the position of the Petitioners in this case. By allowing nonconforming waivers to be enforced, whether through the doctrine of ratification or any other legal construct, this Court would effectively repeal the Older Workers Benefit Protection Act. As stated by the Court in *Howlett et al., supra*:

> Congress had purposely interposed an obstacle to application of the traditional

> ratification doctrine by requiring that a knowing and voluntary waiver of an ADEA claim cannot occur except in cases in which, at a minimum, the eight OWBPA factors are met.

(App. A at pp. 6a-7a).

The clear intent of the OWBPA is to protect employees from waiving ADEA rights unless its provisions are met. The intent of the Act must not be subverted by allowing the application of the common law doctrine of ratification, or any other doctrine, to create an unintended result — the enforcement of noncomplying waivers.

II.

ENGRAFTING A "TENDER BACK" REQUIREMENT ON TO THE OWBPA WOULD BE CONTRARY TO ITS INTENT AND WOULD BE INEQUITABLE.

A. Requiring Tender Back Is Contrary To The Intent Of The Statute.

The Petitioner asserts that the failure of the respondents to "tender back" the severance pay they received in exchange for their noncomplying "waiver" must result in dismissal of the case because it constitutes ratification. As stated above, the retention of severance pay cannot serve to "ratify" an illegal waiver, nor is it required that it be tendered back prior to instituting a lawsuit.

First of all, the statute itself does not make mention of tendering back consideration prior to challenging or enforcing a waiver. The statute does contain an enforcement provision providing that in any dispute over whether the requirements of

the Act have been met, "the party asserting the validity of a waiver shall have the burden of proving in a Court of competent jurisdiction that a waiver was knowing and voluntary pursuant to paragraph (1) or (2)." 29 U.S.C. § 626(f)(3). There is no mention of tendering back consideration received prior to a lawsuit. Furthermore, the statute places the burden of proof squarely on the party asserting the validity of the waiver, in this case, the Petitioners. By requiring that consideration received be tendered back to the Company beforehand, the Petitioner demands respondents in essence post a bond prior to filing suit. This would be done before any decision is made concerning the validity of the waiver, before any discovery is taken by either side, and before the case is even filed. If the Court adopts this position, quite obviously, many plaintiffs would be prevented from ever filing a lawsuit no matter how egregious the violation of OWBPA and no matter how blatant the underlying age discrimination that occurred.

Again, the "tender back" requirement is a common law doctrine that the Petitioner asks this Court to engraft onto the OWBPA. This the Court should not do so for the same reason it should not allow noncomplying waivers to be ratified by retention of severance pay; to do such a thing defeats the purpose and intent of the statute. The retention of severance pay has no affect on the existence or non existence of the plaintiffs' ADEA rights.

The only thing that effects ADEA rights is whether a waiver meets the requirements of the OWBPA. If the waiver meets those requirements, then an individual's ADEA rights have been waived; if not, an individual's ADEA rights have not been waived, and they may be enforced through the legal system.

If the defendant claims, as it does here, that the severance pay received by the plaintiffs should be returned to them, let

them sue the plaintiffs for the return of the money if a valid theory of recovery exists. In fact, one does not. Even under defendants' common law theory, when a contract is void on the ground of public policy it is unenforceable and the law leaves the parties as it finds them. Restatement (2d), Contracts, § 178 (1997). Because the defendants' counter-suit is based upon a waiver not in compliance with the statute, it has no grounds to seek return of the severance given to its employees. That is because no waiver of ADEA rights ever existed, and does not now exist. In this situation, restitution, or tender back is not available even under the defendants' common law theories. Restatement (2d), Contracts, § 197 (1978).

In *Raczak v. Ameritech*, 103 F.3d 1257 (6th Cir. 1997), Judge Jones, writing for the Court, points out that the Supreme Court dealt with the tender back issue in *Hogue v. Southern Railway*, 390 U.S. 516 (1968) finding that no tender back would be required of an employee challenging an illegal waiver. The *Hogue* case, *supra*, dealt with an analogous situation. The Federal Employer's Liability Act (FELA), 45 U.S.C. § 55, also occupied the law of waivers pertaining to railroad employees. The FELA occupied the law on waivers by prohibiting them entirely with respect to railroad employees. The Older Workers' Benefits Protection Act occupies the law on waivers pertaining to ADEA rights by prohibiting them unless its requirements are met. Both statutes are remedial in nature and in that case the United States Supreme Court ruled:

> There is no occasion to decide whether the release here involved violated § 5. It is sufficient for the purposes of this decision to note that a rule which required a refund as a prerequisite to institution of suit would be "wholly incongruous with the general policy of the Act to give railroad employees a right

> to recover just compensation for injuries negligently inflicted by their employers". *Dice v. Akron, C.&Y.R. Co.*, supra, 342 US at 362, 72 S. Ct. at 314. Rather, it is more consistent with the objectives of the Act to hold, as we do, that it suffices that, except as the release may otherwise bar recovery, the sum paid shall be deducted from any award determined to be due to the injured employee. *Cf. Callen v. Pennsylvania R. Co.*, 332 U.S. 625, 68 S. Ct. 296, 92 L. Ed. 242.

390 U.S. 516 at 517.

As indicated by Judge Jones, "the *Hogue* decision is the only time the Supreme Court has spoken on the issue of tender back requirements and should be followed by this Court" 103 F.3d p. 1270 Judge Jones pointed out that other courts applied *Hogue* to bar tender back requirements in lawsuits involving federal statutes other than FELA, citing *Smith v. Pinell*, 597 F.2d 994, 996 (5th Cir. 1979), barring a tender back requirement pursuant to the Jones Act, and *Wasner v. American Motor Sales Corp.*, 597 F. Supp. 991, 998 (E.D. Pa. 1984) holding that there was no tender back requirement in a case involving the Automobile Dealers Day In Court Act. The Court, therefore, should follow its previous decision in *Hogue* and not require a tender back, but rather allow the severance pay received to be counted as a set-off against any damages plaintiffs are awarded in this case.

B. Engrafting A Tender Back Requirement On The OWBPA Would Be Inequitable.

A substantial deterrent to bringing a lawsuit under the ADEA would result if the Court required a tender back of severance pay, frustrating the intent of Congress as expressed

in the Senate Committee Report indicating the OWBPA's objective was to "insure that older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA" (Senate Report pp. 101-263, p. 5). Requiring tender back would allow the Petitioner to obtain the same objectives sought by way of its ratification argument since most plaintiffs would be unable to return the money received. Engrafting a tender back requirement onto the OWBPA allows a company to violate the law twice and get away with it; first by committing age discrimination in the termination process, and second by providing a nonconforming "waiver". Surely, this is not the intent of Congress. Employers are aware that many employees will not be able to return severance pay since it is needed for living expenses and, therefore, will not be able to enforce legal rights under the ADEA no matter how egregiously violated. Since employees covered by the ADEA are over age 40 they face an uncertain future in the job market and often can only hope to be under employed if successful at finding a job. In light of all of these considerations, the lower court decision of Judge Avern Cohn states that practical effect of a tender back requirement makes it unlikely that employees will "be able to put their severance payments aside for future tenders, or be able to come up with the monies to make such a tender at such later time as they acquire grounds to believe that a successful lawsuit might be mounted in connection with their retirements." (Cohn Op. at 27).

In addition, the terms of the termination agreement itself makes return of the entire amount of severance pay inequitable. Paragraph 14 of the Agreement drafted by Petitioner states:

> The provisions of this agreement are severable, if any provision or the scope of any provision is found to be unenforceable by a court of competent jurisdiction, the other provisions or the effected provisions as

> reduced in scope shall remain fully valid and enforceable.

The Petitioner received a valid waiver of all of the Respondent's rights under State law and all of the Respondent's rights under Federal law except those rights under the ADEA which were not waived by the nonconforming waiver. Pursuant to the terms of its own agreement Petitioner received the benefit of its bargain and the agreement should be enforced as written.

The Petitioner now wants to belatedly re-write its own agreement to require re-payment of all severance pay provided prior to suit. No such provision exists in the agreement. In fact, the concept of tendering back consideration is not mentioned anywhere in the termination agreement. It would not be fair to impose this pre-suit requirement on Respondents at this late date.

With regard to the equities of allowing employees to pursue enforcement of their ADEA rights while retaining severance pay received in exchange for a noncomplying release, Judge Ryan in *Howlett et al. v. Holiday Inns*, stated:

> Notably, the OWBPA itself contains no sanction for noncompliance. In other words, although employers are charged with writing valid releases, there is no automatic penalty if they fail to do so. See 29 U.S.C. § 626(F)(3). Thus, the only external incentive an employer has to comply with the OWBPA is the savings gained by obtaining valid releases. In the normal case, the cost to an employer of paying an employee for the release is less than the cost of litigating potential ADEA claims; thus, the incentive for employers to voluntarily comply with the OWBPA.

> However, in cases where the employer knows that it has impermissibly discriminated based upon age and that the OWBPA information will likely demonstrate such discrimination, and we do not suggest that this is one of them, the economic incentive to comply with the OWBPA will be insufficient. In such a case, the employer may gamble and decide not to provide the OWBPA information, hoping that an employee who does not know he or she has been discriminated against will be less likely to sue, and will also accept less money for the ADEA waiver. The savings in not having to pay the full settlement value of a viable ADEA claim may outweigh the risk of later not being able to enforce the waiver. In this latter instance, *the purpose* of the OWBPA to provide employees with sufficient information to evaluate the worth of potential ADEA claims *would be frustrated in the very case in which the information is most important.*

(Emphasis added) *Howlett, et al., supra* at App A. at pp. 8a-9a.

Thus, despite the Petitioner's protestations to the contrary, it is equitable to allow the Plaintiffs' to retain severance pay received and count it as a set off against any damages later obtained in a lawsuit. Corporations should not be allowed to both violate the law on waivers and discrimination because an employee is unable to tender back severance pay. There can be no question that the overriding intent of the OWBPA was to attempt to equalize the bargaining power between corporations and employees. The OWBPA does this and its effect should not be undermined by yet another clever attempt to coerce employees

into giving up their rights under the ADEA by engrafting a tender back requirement onto the Older Workers Benefit Protection Act.

CONCLUSION

The Court should reject the argument of the Petitioners in this case for all the reasons stated herein. This case should be joined with the case of *Oubre v. Entergy Operations, Inc.*, No. 96-1291 (cert. granted April 21, 1997), because it presents the same issue as this case. If not joined, the Respondents request that the Court consider the arguments made by them when deciding the *Oubre* case.

Respectfully submitted,

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APPENDIX A — DECISION OF *RONALD H. HOWLETT, ET AL. vs. HOLIDAY INNS, INC.* OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED AUGUST 5, 1997

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0232P (6th Cir.)
File Name: 97a0232p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RONALD H. HOWLETT; GRAVES B. IVEY; SIEGFRIED K. KONETZNY; JEFFREY E. MCLAUGHLIN; HOMAYOON MESHGINPOOSH; TERRY PHILLIPS; EDWARD RINCKEL; FREDERICK C. ROOZEN; CHRISTOPHER R. RYAN; RENE H. SCHIEGG; FRED WRIGHT,
Plaintiffs-Appellees,

v.

HOLIDAY INNS, INC., a Tennessee corporation,
Defendant-Appellant.

No. 95-6236

Appeal from the United States District Court
for the Western District of Tennessee at Memphis.
No. 92-02885--Julia S. Gibbons, Chief District Judge.

Argued: September 18, 1996

Decided and Filed: August 5, 1997

Appendix A

Before: GUY and RYAN, Circuit Judges; JARVIS, Chief District Judge.*

COUNSEL

ARGUED: Beth M. Rivers, WAHL & RIVERS, Detroit, Michigan, for Appellee. Frederick J. Lewis, McKNIGHT, HUDSON, LEWIS & HENDERSON, Memphis, Tennessee, for Appellant. **ON BRIEF:** Rudy J. Huizenga, HUIZENGA, HAGAN, HERGT & RIVERS, Detroit, Michigan, Gerald D. Wahl, Detroit, Michigan, Beth M. Rivers, WAHL & RIVERS, Detroit, Michigan, for Appellee. Thomas L. Henderson, Frederick J. Lewis, Rhonda M. Taylor, McKNIGHT, HUDSON, LEWIS & HENDERSON, Memphis, Tennessee, for Appellant.

OPINION

RYAN, Circuit Judge. We are called upon to decide whether terminated employees who sue their former employers under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, must first tender back any portion of the incentive payment they received for their general promise not to sue on any matter relating to the termination. We hold that because each "Separation Agreement and General Release" signed by the plaintiffs does not contain the minimum information required by the ADEA to be enforceable, it cannot subsequently be validated by the employee by retaining the consideration received for the releases. Therefore, we further hold that plaintiffs may prosecute their ADEA action without

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*The Honorable James H. Jarvis, II, Chief United States District Judge for the Eastern District of Tennessee, sitting by designation.

returning any of the severance money given them by defendant. Therefore, we shall affirm the district court's order denying summary judgment.

I.

Plaintiffs are former upper-level management employees of Holiday Inns, Inc. In 1991, Holiday Inns was acquired by a British corporation, and after a corporate restructuring, plaintiffs lost their jobs. Each plaintiff signed an individual separation and release agreement in exchange for an unspecified sum of money. The agreement provides, in pertinent part:

> Employee forever and unconditionally releases the Released Parties from any and all claims . . . related in any way to anything occurring up to and including the date hereof. Without limiting the generality of the foregoing, this Agreement applies to any and all claims which in any way result from, arise out of, or relate to Employee's employment, termination or resignation from employment with the Company or any of the Released Parties, including but not limited to, any and all claims which could have been asserted under any fair employment, contract or tort laws, ordinance [sic], including Title VII of the Civil Rights Act of 1964, the Tennessee Anti-Discrimination Act, the Employee Retirement Income Security Act, or under any of the Company's employee benefit, compensation, bonus, performance, award, severance, or vacation pay plans . . . .

Each plaintiff was instructed that he had 72 hours to sign and return the agreement in order to be eligible for the incentive. Nowhere does the agreement explicitly refer to ADEA claims.

In 1992, plaintiffs sued, alleging that their termination violated the ADEA; however, they did not return any portion of the incentive payments which they had received from Holiday Inns or offer to do so. The defendant moved

for summary judgment, arguing that, even if the release is defective under the ADEA, plaintiffs had ratified it by keeping the incentive money they were paid and were therefore barred from pursuing any employment-related claim. The district court held otherwise, reasoning that the purposes of the ADEA would be frustrated by a tender-back requirement. Recognizing the split among the circuits on this question and the absence of controlling authority in this circuit, the district court then certified its order denying summary judgment for interlocutory appeal.

II.

A.

Under the Older Workers Benefit Protection Act (OWBPA) amendment to the ADEA, there are eight minimum requirements an ADEA release must meet before it can be considered "knowing and voluntary." 29 U.S.C. § 626(f). Paraphrasing, they are:

(1) The release must be written in a manner calculated to be understood by the employee signing the release, or the average individual eligible to participate;

(2) the release must specifically refer to the ADEA;

(3) the release must not purport to encompass claims that may arise after the date of signing;

(4) the employer must provide consideration for the ADEA claim above and beyond that to which the employee would otherwise already be entitled;

(5) the employee must be advised in writing to consult with an attorney;

(6) the employee must be given at least 21 or 45 days to consider signing, depending on whether the incentive is offered to a group;

(7) the release must allow the employee to rescind the agreement up to 7 days after signing; and

(8) if the release is offered in connection with an exit incentive or group termination program, the employer must provide information relating to the job titles and ages of those selected (or eligible) for the program, and the corresponding information relating to employees in the same job titles for those who were not selected (or not eligible) for the program.

29 U.S.C. § 626(f)(1). Holiday Inns acknowledges that none of the foregoing requirements were met with respect to the release in question, save possibly the first. Thus, under the terms of the ADEA, the release signed by the plaintiffs was not knowing and voluntary; therefore, it was not valid.

Nevertheless, Holiday Inns argues, plaintiffs have subsequently knowingly and voluntarily ratified the defective contract of release by not returning the consideration paid for the releases. Holiday Inns relies heavily upon decisions in the Fourth and Fifth Circuits in which these courts have read the OWBPA amendment as retaining the common-law doctrine of ratification. *See Blistein v. St. John's College*, 74 F.3d 1459, 1465-66 (4th Cir. 1996); *Blakeney v. Lomas Info. Sys., Inc.*, 65 F.3d 482, 485 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 1042 (1996). These courts have ruled that, despite signing a release that does not comply with the ADEA, an employee who keeps the incentive paid for the ADEA waiver has ratified the contract, and is thereby bound by it. *Blistein*, 74 F.3d at 1465-66; *Blakeney*, 65 F.3d at 485. These courts reason that the OWBPA amendment merely codified the common-law elements of "knowing and voluntary," leaving the doctrine of ratification intact. *See Blistein*, 74 F.3d at 1465-66; *Wamsley v. Champlin Ref. and Chems., Inc.*, 11 F.3d 534, 538-39 (5th Cir. 1993).

Additionally, the *Wamsley* court looked to the OWBPA's legislative history to determine that applying the ratification

doctrine was consistent with the purposes of the ADEA. That is, the congressional committee that proposed the OWBPA amendment to the ADEA discussed several of the common-law instances in which a voidable contract could be ratified, such as instances in which the original contract was procured through fraud, duress, coercion, or mistake, *id.* at 539 n.8, thus suggesting that Congress viewed noncompliance with the OWBPA requirements in the same light, *id.* Also, the *Wamsley* court reasoned that, if employees were excused from tendering back the consideration paid for waiving ADEA claims when such claims are later brought anyway, employers would be deterred from offering private agreements which settle potential claims, thereby defeating one of the purposes of the ADEA. *Id.* at 539.

The difficulty with the defendant's argument and with the reasoning of the *Blistein*, *Blakeney*, and *Wamsley* decisions, we think, is that they fail to address the straightforward language of the statute. The OWBPA unambiguously states at section 626(f)(1) that an individual "may not waive" ADEA claims unless the OWBPA requirements are met. There is no hint of any exception.

Thus, it is clear from the statute that a former employee could no more assent to the waiver of his or her ADEA claims *after* having signed the defective release than he or she could *at the time* of signing it. Although Congress utilized the familiar language of the common law when it deemed that no waiver would be "knowing and voluntary" unless the eight OWBPA requirements were met, it did not stop there; it also provided that an individual *may not waive* an ADEA claim unless the waiver is knowing and voluntary. 29 U.S.C. § 626(f)(1). Allowing an employee to ratify a release which violates the OWBPA would directly contradict this language.

Congress has purposely interposed an obstacle to application of the traditional ratification doctrine by requiring that a knowing and voluntary waiver of an ADEA

claim cannot occur except in cases in which, at a minimum, the eight OWBPA factors are met. The common law would invalidate a contract as not being knowing or voluntary if it were secured through fraud, duress, coercion, or mistake. But, under the common law, such an invalid contract *could* be ratified by the retention of the consideration once the fraud, duress, coercion, or mistake was uncovered. The rationale for this rule is that, by keeping the consideration after the voidability of the contract is discovered, the promisor makes a new contract, this time knowing all the facts and circumstances. He renews his promise and keeps the consideration, forming a new contract, because the element which made the original contract invalid is no longer present. *Wamsley*, 11 F.3d at 540 (citing the Restatement (Second) of Contracts §§ 2 and 19 (1981), and 1 Samuel Williston, Williston on Contracts § 98 (1957)).

But, in this case, the invalidating flaw has *not* been eliminated. The OWBPA information still has not been supplied. It is as if, under a common-law analysis, the fraud, duress, coercion, or mistake infected the new, supposedly ratified contract as well. Thus, even under this analysis, the employee cannot validate the noncomplying release simply by retaining the consideration.

The overarching purpose of the OWBPA amendment is to provide employees with information giving them "the ability to assess the value of the right to sue for a possibly valid discrimination claim." *Raczak v. Ameritech Corp.*, 103 F.3d 1257, 1262 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3001 (U.S. June 18, 1997) (No. 96-2002). These plaintiffs are in no better position now to make this assessment than they were when they signed the releases. *See Long v. Sears Roebuck & Co.*, 105 F.3d 1529, 1542 (3d Cir. 1997), *petition for cert. filed*, 65 U.S.L.W. 3840 (U.S. June 9, 1997) (No. 96-1988). Although the *Wamsley* court rejects this analysis, claiming that the "new" promise is somehow "not subject to the waiver requirements of [the OWBPA]," it provides no justification for such an exception. *Wamsley*, 11 F.3d at 540 n.11. The new

promise still purports to be a release from ADEA claims and is still, by the terms of the OWBPA, invalid if it does not contain the information Congress has required.

B.

Nevertheless, the fact that the terminated employees cannot ratify a defective ADEA waiver merely allows them to pursue their ADEA claims. It does not, by itself, require that they be allowed to retain the consideration paid for an invalid bargain. Although Holiday Inns argues that equitable principles require the return of this money in exchange for which there was no valid promise, we are constrained from providing such relief by the purposes of the OWBPA and, more importantly, practical considerations.

Notably, the OWBPA itself contains no sanction for noncompliance. In other words, although employers are charged with writing valid releases, there is no automatic penalty if they fail to do so. *See* 29 U.S.C. § 626(f)(3). Thus, the only external incentive an employer has to comply with the OWBPA is the savings gained by obtaining valid releases. In the normal case, the cost to an employer of paying an employee for the release is less than the cost of litigating potential ADEA claims; thus the incentive for employers to voluntarily comply with the OWBPA.

However, in cases where the employer knows that it has impermissibly discriminated based upon age and that the OWBPA information will likely demonstrate such discrimination, and we do not suggest that this is one of them, the economic incentive to comply with the OWBPA will be insufficient. In such a case, the employer may gamble and decide not to provide the OWBPA information, hoping that an employee who does not know he or she has been discriminated against will be less likely to sue, and will also accept less money for the ADEA waiver. The savings in not having to pay the full settlement value of a viable ADEA claim may outweigh the risk of later not being able

to enforce the waiver. In this latter instance, the purpose of the OWBPA to provide employees with sufficient information to evaluate the worth of potential ADEA claims would be frustrated in the very case in which the information is most important.

In the case before us, as in most instances, there has been no determination of the amount of the consideration allocable to the ADEA waiver and the amount paid for other potential claims. As the separation and release agreement indicates, Holiday Inns' former employees explicitly released the defendant from liability for multiple claims, and, since ADEA liability was not specified, we may infer that Holiday Inns has paid for the release of a number of other claims. It would be extremely difficult, if not impossible, for the district court to identify all the potential theories of liability that these former employees have waived in consideration for money payments. And it would be impossible to assign meaningful values to all those potential claims and then apportion some of the consideration for the ADEA claims, and the rest for the remaining claims. *See Long*, 105 F.3d at 1543-44.

Lastly, also as a practical matter, we note that the eight OWBPA requirements should not be difficult for an employer to meet. Although questions may arise as to whether the information provided by the employer can be understood by the average individual eligible to participate in the severance program, or as to what constitutes a "job title," *see Raczak*, 103 F.3d at 1262, courts should read these requirements in a common-sense manner and not dogmatically. When the provided information reasonably assists the employee in determining whether he or she wishes to waive a potential ADEA claim, then summary judgment may be appropriate in favor of the employer. Thus, Holiday Inns can hardly complain about the inequity of losing the benefit of its bargain, when it did not even attempt to comply with the minimal requirements of the OWBPA. And, we will not impose the impossible task on district courts of separating out the consideration paid for

ADEA waivers from that paid for all other claims, especially in light of the relative ease with which employers could avoid such complications by complying with the OWBPA.

III.

For the foregoing reasons, the district court's order denying summary judgment is **AFFIRMED**, and the case is **REMANDED** for further proceedings.